IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-32410

NETLINK 2000, INC.

Debtor

M E M O R A N D U M

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The court, acting sua sponte, has raised the issue of whether the Debtor's present Chapter 11 bankruptcy case should be dismissed or be allowed to proceed, in conjunction with a previous, and pending, Chapter 11 case, number 01-34986, that has a confirmed plan, but has not yet been closed.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

The Debtor filed its first case under Chapter 11, number 01-34986, on October 10, 2001. On August 15, 2002, the Debtor filed its Amended Plan of Reorganization, which was confirmed by Order of the court entered April 4, 2003 (collectively, the Confirmed Plan). The Confirmed Plan provides for payment of two classes, administrative claims and nonpriority unsecured claims. The class of administrative claims consisted of two creditors: (1) the United States Trustee; and (2) the Debtor's attorney in the first case, Billy Sams, Esq.[1] The class of unsecured claims included three creditors: (1) Anthony Shields; (2) Interstate 2000, Inc.; and (3) BellSouth. As set forth in the Confirmed Plan, its effective date was May 4, 2003, thirty days following the court's Order confirming the plan.

On April 30, 2003, the Debtor filed the Voluntary Petition initiating the present case. The Debtor included all of the creditors provided for in the prior case, in addition to including payroll taxes in the amount of $5,300.00 owed to the Internal Revenue Service, telecommunications taxes in the amount of $4,942.00 and franchise and excise taxes in the amount of $100.00 owed to the

[1] The Debtor has employed different counsel for the present case.

Tennessee Department of Revenue, and an unsecured claim owed to its telephone provider, BTI, for long distance telephone service from December 2002 through April 2003, in the amount of $21,822.13.

On May 2, 2003, the court held an emergency hearing on the Debtor's Motion to Pay Prepetition Wages filed on May 1, 2003, in the present case. At this hearing, the court questioned the Debtor's principal and its attorney as to its reasons for filing the present case and whether the present case should be allowed to go forward in light of the pendency of the prior case. The Debtor's principal acknowledged that the Confirmed Plan in the prior case had only recently been confirmed; however, he contended that the Debtor had been in a dispute with BTI, its telephone services provider, as to the amounts owed on the Debtor's account. The Debtor's principal stated that BTI had threatened to cut off the Debtor's long distance service based upon this large outstanding, and previously disputed, balance on the Debtor's account, forcing the Debtor to file the present case.

At the May 2, 2003 hearing, the court advised the Debtor and the United States Trustee that it was scheduling a hearing for May 5, 2003, to allow the parties time to research the issue of whether the pendency of the prior case precluded the commencement of the present case. At the May 5, 2003 hearing, the court questioned the Debtor's attorney as to Debtor's intentions for administrating the two separate Chapter 11 bankruptcy cases. The Debtor's attorney stated his intention to incorporate the Confirmed Plan in the prior case into the plan formulated in the present case, with the same class treatment; the only change being the addition of BTI's claim and payment therefor. After discussion between the court, the Debtor's attorney, and the attorney for the

United States Trustee, the parties agreed that the best course of action would be to dismiss the present case and modify the Confirmed Plan in the prior case. Nevertheless, the court believes that it is necessary to elaborate upon its reasons for dismissing the present case and for suggesting that the Debtor attempt to modify its Confirmed Plan in the prior case.

II

Although there is no statutory constraint on serial filings by corporate debtors, if one bankruptcy proceeding is pending, a debtor cannot proceed with another case to deal with the same debts. *See Freshman v. Atkins*, 46 S. Ct. 41, 42 (1925); *Fruehauf Corp. v. Jartran, Inc. (In re Jartran)*, 886 F.2d 859, 871 (7th Cir. 1989); *Prudential Ins. Co. of Am. v. Colony Square Co. (In re Prudential Ins. Co. of Am.)*, 40 B.R. 603, 605 (Bankr. N.D. Ga. 1984). This proposition "stems from well-established notions of orderly administration of justice, the court's inherent right to protect its own jurisdiction, and the court's duty to preclude, where possible, an abuse of the bankruptcy laws." *Prudential Insurance Company*, 40 B.R. at 605. The court has the authority to dismiss a bankruptcy case under Bankruptcy Code § 1112(b)[2] pursuant to its inherent powers set forth in 11 U.S.C.A. § 105(a) (West 1993), which provides as follows:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[2] Section 1112(b) provides in material part that "on request of a party in interest or the United States trustee . . . the court may . . . dismiss a case under this chapter . . . for cause . . . ." 11 U.S.C.A. § 1112(b) (West 1993 & Supp. 2003).

11 U.S.C.A. § 105(a) (West 1993); *see also Pleasant Pointe Apartments, Ltd. v. Ky. Housing Corp.*, 139 B.R. 828, 831-32 (W.D. Ky. 1992); *In re Great Am. Pyramid Joint Venture*, 144 B.R. 780, 789 (Bankr. W.D. Tenn. 1992).

A

The first issue before the court is whether the April 4, 2003 Confirmed Plan effectively ended the prior case, whereby the present case is not a simultaneous filing. Plan confirmation in a Chapter 11 case is governed by 11 U.S.C.A. § 1129 (West 1993 & Supp. 2003), which sets forth the requirements necessary for confirmation. Generally, once a Chapter 11 plan is confirmed, the debtor is **?**discharged," the bankruptcy estate terminates, and unless otherwise specified in the confirmation order, **?**all of the property of the estate [vests] in the debtor." 11 U.S.C.A. § 1141 (West 1993) (setting forth the effects of confirmation); *In re Pauling Auto Supply, Inc.*, 158 B.R. 789, 793 (Bankr. N.D. Iowa 1993).[3] At that point, **?**[t]he [bankruptcy] estate ceases to exist." *Pauling Auto Supply*, 158 B.R. at 793 (citing *In re T.S.P. Indus., Inc.*, 117 B.R. 375, 377 (Bankr. N.D. Ill. 1990)). Additionally, once a plan is confirmed and discharge occurs, the automatic stay is terminated. *See* 11 U.S.C.A. § 362(c)(2)(C) (West 1993).[4]

[3] The Debtor's Confirmed Plan does not have any provisions allowing the court to retain any further jurisdiction other than to allow the court to enter a final decree and to hear any pending motions, contested matters, or adversary proceedings. *See* Confirmed Plan, at ¶ 9.

[4] Furthermore, in this case, the Confirmed Plan expressly states that **?**the automatic stay provisions of 11 U.S.C. § 362 are to be lifted upon confirmation." Confirmed Plan, at ¶ 8.

There is a split as to when filings by the same debtor shift from simultaneous to serial and whether or not either are allowed. Some courts have held that as long as a discharge has been entered in the first case, the subsequent case would be allowed, despite the fact that the first case has yet to be officially closed. *See, e.g., In re Strohscher*, 278 B.R. 432, 434-37 (Bankr. N.D. Ohio 2002) (declining to adopt a per se prohibition on simultaneous filings but finding that the court should closely scrutinize the subsequent filing to ensure that the bankruptcy process is not being abused); *In re Cowan*, 235 B.R. 912, 915-16 (Bankr. W.D. Mo. 1999) (allowing a debtor to maintain a second bankruptcy case filed after the first case was discharged but prior to its closing); *Grimes v. Farmers Home Admin. (In re Grimes)*, 117 B.R. 531, 536 (B.A.P. 9th Cir. 1990) (holding that confirmation of a chapter 11 plan ended that case, so the debtor was allowed to maintain a petition under Chapter 12 before the Chapter 11 case was closed or the plan was consummated, stating that "a debtor who has been granted a discharge under one chapter under Title 11 may file a subsequent petition under another chapter even though the first case remains open, as long as the debtor meets the requirements for filing the second petition").[5]

Other courts have held that if a final decree has not been entered, the bankruptcy court retains jurisdiction over the proceeding, and a subsequent case cannot be filed. *See, e.g., In re Keen*, 121 B.R. 513, 515 (Bankr. W.D. Ky. 1990) (dismissing with prejudice a Chapter 11 case filed while a Chapter 7 case was still pending); *In re Bodine*, 113 B.R. 134, 135 (Bankr. W.D.N.Y. 1990) (declining to allow simultaneously pending cases because doing so would provide debtors with "an easy avenue for abuse of the bankruptcy system"); *In re Gerth*, 116 B.R. 167, 169 (Bankr. D.S.D. 1989) (because a final decree

[5] The court notes, however, that these cases dealt primarily with a Chapter 7 debtor receiving a discharge and then filing a Chapter 13 case on the heels of the previous Chapter 7 case, prior to its closing.

had yet to be entered in the debtor's previous Chapter 11 case, despite confirmation and consummation of the Chapter 11 plan, the debtor could not proceed with a subsequent Chapter 12 filed to stop a foreclosure after the debtor defaulted under the terms of his confirmed Chapter 11 plan).

Finally, in the middle are courts which have required something more than discharge but something less than entry of a final decree. *See, e.g., In re Del. Valley Broadcasters, Ltd. P'ship,* 166 B.R. 36, 39-41 (Bankr. D. Del. 1994) (finding that because the plan had not been substantially consummated, nor had the final decree been entered, successive Chapter 11 cases would not be allowed); *Prudential Insurance Company,* 40 B.R. at 606 (holding that the debtor would not be allowed to circumvent its unconsummated Chapter 12 plan by filing a new Chapter 11 bankruptcy case and **?**[i]n fact, the mere possibility that a court will be forced to entertain simultaneous bankruptcy cases has been held sufficient to warrant the dismissal of a second petition"). Similarly, the *Delaware Valley Broadcasters* court determined that:

> If this court were faced with a debtor which had substantially consummated its first reorganization plan, it would be examining an issue regarding a serial filing. However, where no consummation has taken place in the original case, no final decree has been entered, the case remains open on the docket, numerous pleadings pertaining to matters significant to the case have been filed post[-]confirmation, and Debtor's second filing comprises much of the same debt as the first, the first case is not in a posture to be considered concluded. Any subsequent filing is, therefore, not a **?**serial" filing.
>
> Debtor's assertions that its plan in the first case is dead and the case cannot be revived are without merit. While the Debtor may desire the end of the first case, the obligations of the debtor to its creditors thereunder remain. Those obligations are as yet unfulfilled. The filing of a second case should not be permitted to alter or negate the existence, priority or amount of those obligations.

Delaware Valley Broadcasters, 166 B.R. at 40.

Here, the Confirmed Plan in the prior case was entered on April 4, 2003. However, the effective date for the Confirmed Plan was thirty days later, or May 4, 2003, so no payments pursuant to the Confirmed Plan should have been made to creditors. Moreover, no final decree has been filed, and the case has not been closed pursuant to 11 U.S.C.A. § 350 (West 1993). Be that as it may, on April 30, 2003, the Debtor filed the present case for the express purpose of reinstating the automatic stay and preventing BTI from taking any action to cut off the Debtor's telephone service. The schedules for the present case list all of the creditors from the prior case, plus the inclusion of three new creditors. The court agrees that **?**where one bankruptcy case remains pending, **‹**there cannot be a subsequent one effecting [sic] the same debt.'" *Gerth*, 116 B.R. at 168 (quoting *In re Smith*, 85 B.R. 872, 873 (Bankr. W.D. Okla. 1988)).

B

Another issue of concern to the court is the treatment of claimants in successively-filed cases. One reason for not allowing serial or simultaneous Chapter 11 bankruptcy cases concerning the same creditors is the disparate treatment of administrative claims from the first-filed proceeding as general unsecured creditors in the second-filed proceeding. *See, e.g., Delaware Valley Broadcasters*, 166 B.R. at 39. As that court stated:

> Parties dealing with a Debtor during the course of the Chapter 11 do so with the understanding that if their debts are not paid in the ordinary course, they may be accorded administrative status. Those claimants whose debts fall within the ambit of administrative

> expense pursuant to 11 U.S.C. § 503[6] deserve to have their claims treated as such. If a debtor-in-possession is permitted to file subsequent cases without substantial consummation, each subsequent case will result in diminished treatment for the same debt. Should Debtor's second case be permitted to proceed, those creditors having administrative claims in the first case would hold only unsecured claims in the second case for the very same debt. Such results would cast doubt upon dealing with any debtor-in-possession and potentially undermine the viability of the bankruptcy system.

Delaware Valley Broadcasters, 166 B.R. at 39.

This exact treatment would occur in the present case as to administrative claims provided for in the Confirmed Plan of the prior case, as follows:

> Class One Administrative Claims. This class consists of two creditors, the United States Trustee and the attorney for the Debtor. The United States Trustee will be paid in full on the date of confirmation and the fee is expected to be $500.00.
>
> The attorney for the Debtor's [sic] fees and expenses will be paid as the cash flow allows after application to the Court and its approval. The amount of fees and expenses are anticipated to be approximately $12,000.00.

Confirmed Plan, at ¶ 1.[7] Attorneys' fees in the approximate amount of $12,000.00 to be paid to Mr. Sams for his representation of the Debtor in the prior case are expressly classified as an administrative expense in the Confirmed Plan. However, under the terms of any new plan filed in the present case, those attorneys' fees lose their classification and priority as an administrative expense and instead are relegated to classification and payment as unsecured nonpriority claims.

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[6] Under section 503, administrative expenses include, for the purposes herein, ?the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]" 11 U.S.C.A. § 503(b)(1)(A) (West 1993 & Supp. 2003).

[7] The Confirmed Plan contains no provisions for payment of any administrative expenses arising between the filing of the amended plan and its confirmation.

Treatment of BTI's claim would also be different, depending upon under which bankruptcy case it would be paid. BTI was not a party to the Confirmed Plan in the prior case because, during the confirmation process, the Debtor believed the account to be current. Inasmuch as the debt was incurred between December 2002 and April 2003, during the pendency of the prior case, the Debtor concedes that it falls within the scope of an administrative expense in the prior case. This same debt, however, would not be an administrative expense of the Debtor's present case, if allowed to proceed, because it was incurred prior to the Debtor's filing of the bankruptcy petition on April 30, 2003, and is not an **?**actual or necessary cost of preserving the bankruptcy estate" in the present case. Instead, the debt owed to BTI for those months is simply an unsecured debt not entitled to any priority. *See, e.g.*, *Jartran*, 886 F.2d at 871.

C

The next issue before the court is whether the Debtor could modify the Confirmed Plan in the prior case. Confirmation of a plan and consummation of a confirmed plan are two separate occurrences, and any plan under Chapter 11 can be modified post-confirmation as long as such modification occurs pre-consummation. *See* 11 U.S.C.A. § 1127(b) (West 1993); *In re Townsend*, 187 B.R. 230, 237 (Bankr. W.D. Tenn. 1995). Substantial consummation is defined under the Bankruptcy Code as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

11 U.S.C.A. § 1101(2) (West 1993).

In this case, the Order confirming the Confirmed Plan in the prior case was entered on April 4, 2003. The effective date of the Confirmed Plan was thirty days after the Order confirming the plan was entered by the court, which translates to an actual effective date of May 4, 2003. At the May 5, 2003 hearing, the Debtor's attorney acknowledged that the Confirmed Plan had not yet been substantially consummated. There is no reason why the Debtor cannot attempt to modify the confirmed, yet unconsummated, plan in the prior case, number 01-34986. In the court's opinion, that is the Debtor's only option for reorganization.

III

In summary, although the court entered an Order confirming the Chapter 11 plan of reorganization in the Debtor's prior case, number 01-34986, the plan has not yet been substantially consummated, nor has the prior case been closed. Accordingly, case number 01-34986 is still pending, and as such, the Debtor's present case is a simultaneous case filing. Because the Debtor is precluded from maintaining simultaneous bankruptcy cases, the court finds that dismissal of the present case, pursuant to 11 U.S.C.A. § 1112(b), is appropriate. The Debtor may modify its Confirmed Plan in case number 01-34986 to provide for payment of the claims of BTI, the Internal Revenue Service, and the Tennessee Department of Revenue, or it may effectuate a liquidation of the company if it cannot substantially consummate the Confirmed Plan with any such modification.

An order consistent with this Memorandum will be entered.

FILED: May 7, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-32410

NETLINK 2000, INC.

Debtor

O R D E R

For the reasons stated in the Memorandum filed this date, the court, sua sponte, directs that the Voluntary Petition filed by the Debtor on April 30, 2003, commencing this bankruptcy case under Chapter 11 of title 11 of the United States Code, is DISMISSED.

SO ORDERED.

ENTER: May 7, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE